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INDEX

	Page
QUESTION PRESENTED	1
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT:	
I. THIS CASE DOES NOT PRESENT ANY GROUNDS FOR GRANTING A WRIT OF CERTIORARI	7
A. The Case Involves No Important Federal Question	7
B. The Decision Below Is Entirely Consistent With Prior Decisions of This Court	9
C. There Are No Other Reasons Which Would Justify the Granting of Certiorari in This Case	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES:

District of Columbia Redevelopment Land Agency v. *Seven Parcels of Land*, Civil Action No. 1278-71 (D.D.C., July 15, 1975), *aff'd sub nom. Thornton* v. *District of Columbia Redevelopment Land Agency*, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam)	6
Schroeder v. *City of New York*, 371 U.S. 208 (1962)	9
Thornton v. *District of Columbia Redevelopment Land Agency*, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam)	3, 4, 7, 9
United States v. *22,680 Acres of Land in Kleberg County*, 438 F.2d 75 (5th Cir. 1971)	10
Walker v. *City of Hutchinson*, 352 U.S. 112 (1956)	9

OTHER AUTHORITIES:

Federal Rules of Civil Procedure, Rule 60(b)	5, 6, 9
Federal Rules of Civil Procedure, Rule 71A	2, 3, 6, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-325

JAMES R. THORNTON and EDWARD DAVIS,
Administrators—Parcel 515-103, *Petitioners,*

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY,
a body corporate, *et al., Respondents.*

JAMES R. THORNTON and EDWARD DAVIS,
Trustees—Parcel 515-103, *Petitioners,*

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY,
a body corporate, *et al., Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether due process requires that notice of a just compensation hearing be given to defendants in a condemnation proceeding who have failed to file any answer or notice of appearance despite having been

served with notice of the proceeding in the manner prescribed by Rule 71A of the Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

Although the petitioners have set forth several portions of Rule 71A in their petition, they have neglected to include one crucial provision—subsection (e). Subsection (e) of Rule 71A provides, in pertinent part, as follows:

> **(e) Appearance or Answer.** If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. *Thereafter he shall receive notice of all proceedings affecting it.* If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. . . . [emphasis added]

STATEMENT OF THE CASE

The petitioners in this case are administrators and "trustees" purporting to represent the heirs and devisees of Joseph Foller and Katherine Rohleder. The respondents are the Little Sisters of the Poor (Little Sisters), Associated Catholic Charities of the Archdiocese of Washington, Inc., as successor by consolidation to St. Joseph's Home and School (St. Joseph's), and the District of Columbia Redevelopment Land Agency (DCRLA).

The event which gave rise to the petitioners' purported claim is the condemnation of certain real property by the DCRLA. On June 28, 1971, the DCRLA

filed a declaration of taking which included the parcel involved here. To ascertain the property's ownership, DCRLA obtained a title report[1] from Lawyers Title Insurance Corporation (Lawyers Title). That report, which had been updated to the date of the taking, disclosed that the Little Sisters and St. Joseph's each held a one-quarter interest in the property. The report also indicated that the remaining one-half interest in the property was in various known and unknown Foller and Rohleder heirs and devisees ("the heirs"), whose addresses were not given.

The DCRLA proceeded to notify the heirs by publication in the manner prescribed by Rule 71A(d)(3) of the Federal Rules of Civil Procedure. In addition, DCRLA made an independent inquiry in an attempt to locate persons who might have an interest in the property. Through those efforts, the DCRLA located Michael Doyle, a Washington, D.C., attorney, who had been in contact with many of the Foller/Rohleder heirs over a period of years. The DCRLA served Mr. Doyle, and he subsequently corresponded with a number of the heirs about the condemnation proceeding. Joint Appendix at 113-27.[2] Through those letters, and by other means, many of the heirs received actual notice of the condemnation action—as they admitted in their brief

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[1] Exhibit to Petition of the Little Sisters of the Poor for Payment of Money in Satisfaction of Judgment as to Parcel 515-103; *see* Transcript of Hearing held January 26, 1973.

[2] Citations to the "Joint Appendix" refer to the appendix filed in the court of appeals. Thornton v. District of Columbia Redevelopment Land Agency, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam).

to the United States Court of Appeals for the District of Columbia Circuit.[3]

Despite the DCRLA's efforts to notify all interested parties, resulting in actual notice to many of the heirs, none of the heirs filed any answer or notice of appearance. Counsel for the Little Sisters and St. Joseph's entered appearances, however.

On January 26, 1973, a just compensation hearing was held in the district court. Counsel representing DCRLA, the Little Sisters and St. Joseph's were present. The court found the value of the property to be $41,850, based on an appraiser's affidavit. The court then entered orders directing payment of $10,462.50 each to the Little Sisters and St. Joseph's in view of the one-quarter interest each institution was found to have in the property, based on the title report which Lawyers Title had prepared for DCRLA. Joint Appendix at 13-14.[4]

Mr. Doyle continued to correspond with various Foller and Rohleder heirs, both before and after the

[3] In the brief filed on their behalf in the court of appeals, the heirs admitted that "a number of the Foller/Thornton heirs had some actual knowledge of the condemnation action because of the general notice mailed by Mr. Doyle dated July 29, 1971 . . . ." Brief for Appellants at 32, Thornton v. District of Columbia Redevelopment Land Agency, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam).

[4] As has been noted, the title report on which the court and the charities relied was prepared for the DCRLA by a highly reputable, nationwide title company—the Lawyers Title Insurance Corporation. In addition, that report was supported by another title report which the Little Sisters and St. Joseph's obtained independently. *See* Brief for Appellees at 28-29, Thornton v. District of Columbia Redevelopment Land Agency, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam).

entry of the distribution orders on January 26, 1973. *See, e.g.*, Joint Appendix at 113-17, 121. Among those with whom Mr. Doyle corresponded during that period was the petitioners' counsel, Mr. Samuel A. Culotta. Indeed, between January 23, 1973, and January 4, 1974, Mr. Doyle received three separate letters from Mr. Culotta and wrote to Mr. Culotta, or one of his clients, on three different occasions. Joint Appendix at 116, 118-24. Finally, however, by letter dated January 22, 1974, Mr. Culotta advised Mr. Doyle that he had "again reviewed this matter with Thelma Thornton and her two brothers, William and James Thorton in November 1973" but that there had "been no further initiatives from them." Joint Appendix at 125.

Nonetheless, on May 13, 1975, more than 15 months after Mr. Culotta's letter and more than 27 months after entry of the distribution orders, Mr. Culotta filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure. Joint Appendix at 17-27. The motion, made on behalf of James Thornton and Edward Davis, sought to have set aside the just compensation awards which had been made to the Little Sisters and St. Joseph's. James Thornton purported in the motion to be acting as the administrator of the estate of Joseph Foller, who had died on November 16, 1912. Edward Davis purported to be acting as the administrator of the estate of Katherine Rohleder, who died on February 18, 1910. In the motion, petitioners sought to have the distribution orders set aside and to compel the Little Sisters and St. Joseph's to repay their awards into the court registry.

The trial court, the Honorable Gerhard A. Gesell presiding, held a hearing on the Rule 60(b) motion on June 27, 1975. At that hearing, Mr. Doyle testified

concerning his correspondence to various Foller and Rohleder heirs about the property and the condemnation proceeding. Copies of a number of letters were identified and introduced as exhibits.

The trial court denied the motion in a memorandum opinion and order dated July 15, 1975.[5] The court held that no relief from judgment was warranted because "movants had ample notice, slept on their rights for more than a year and failed to present any evidence of extrinsic fraud."[6]

The court of appeals affirmed the district court's determination that the awards to the Little Sisters and

[5] District of Columbia Redevelopment Land Agency v. Seven Parcels of Land, Civil Action No. 1278-71 (D.D.C., July 15, 1975), *aff'd sub nom.* Thornton v. District of Columbia Redevelopment Land Agency, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam). The Memorandum and Order is reprinted at A.4-5.

[6] Judge Gesell summarized his findings as follows:

> It appears that prior to the just compensation proceeding full and adequate notice to all "unknown owners" was given by publication. F.R. Civ. P. 71A(d)(3)(ii). There was also actual notice to many of the Foller and Rohleder heirs. None responded. . . . No basis exists for reopening a final judgment where movants had ample notice, slept on their rights for more than a year and failed to present any evidence of extrinsic fraud. [A.4-5]

In addition, the court noted that since the case involved real property, which would not have been subject to probate, it was "highly questionable" that the administrators even had standing. Apparently as a result of the court's doubt on this point, the administrators entered into arrangements with the heirs which made the administrators "trustees" of most of the heirs' interests in the property. The administrators then filed another Rule 60(b) motion, this time as "trustees," seeking to have the judgments set aside. Joint Appendix at 32-52. The second motion was based on virtually the same grounds as the original motion. After the second motion was denied, appeals were taken with respect to both rulings.

St. Joseph's should not be set aside. *Thornton* v. *District of Columbia Redevelopment Land Agency*, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam). In an unpublished opinion,[7] the court stated in part:

> Finding no abuse of discretion in the district court's denial of appellants' post-judgment motions to set aside the distribution orders of January 26, 1973 and to order the redeposit of sums paid out with respect to Parcel 515-103, we affirm.[8]

ARGUMENT

I. THIS CASE DOES NOT PRESENT ANY GROUNDS FOR GRANTING A WRIT OF CERTIORARI.

A. The Case Involves No Important Federal Question.

Although the petitioners purport to present eight questions for review, the questions all relate to the same issue, which is whether the petitioners were entitled to personal notice of the just compensation hear-

[7] The opinion is reprinted at A.1-3.

[8] Shortly before the court of appeals' decision was announced, the petitioners filed an independent action in the Superior Court of the District of Columbia. They named the Little Sisters, St. Joseph's and Lawyers Title as defendants. In that action, the petitioners again sought to recover from the charities the amounts which had been paid to them in accordance with the two district court orders entered on January 26, 1973.

Motions to dismiss were filed by all defendants. On April 19, 1976, following a hearing, the court dismissed the action as to the Little Sisters and St. Joseph's on the grounds that the claims were barred by res judicata—because of the prior district court judgments—and that the complaint failed to state a claim upon which relief can be granted. The court also dismissed the claims against Lawyers Title. The petitioners have appealed those rulings to the District of Columbia Court of Appeals.

ing in a condemnation proceeding. Since this issue can be resolved by reference to the plain language of Rule 71A, petitioners can show no justification for the granting of certiorari.

Rule 71A(d) provides that notice of the commencement of a condemnation proceeding must be given to all defendants and prescribes the manner of service. Once that notice has been given, Rule 71A(e) requires no notice of any proceedings thereafter except as to defendants who have filed answers or notices of appearance.

In this case, notice of the commencement of the proceeding was served on the petitioners by publication in the manner prescribed by Rule 71A(d)(3)(ii). Publication of the notice was completed on February 21, 1972, more than 11 months before the just compensation hearing. In addition, many of the petitioners received actual notice of the proceeding. *See* note 3 *supra*. Nevertheless, none of the petitioners filed any answer or notice of appearance. Hence, under Rule 71A(e), petitioners were not entitled to notice of any further proceedings. Moreover, even after learning of the just compensation hearing, the petitioners' counsel took no action in the proceeding for approximately 15 months. *See* page 5 *supra*.

In summary, the notice given to petitioners in the condemnation proceeding fully satisfied the requirements of Rule 71A, and petitioners have failed to identify any issue of federal law which would justify the granting of certiorari.

B. The Decision Below Is Entirely Consistent With Prior Decisions of This Court.

The decision of the court of appeals, in affirming the trial court's denial of the petitioners' Rule 60(b) motions, is entirely consistent with prior decisions of this Court. The petitioners apparently argue that this case presents a unique due process issue with respect to the notice requirements in a condemnation proceeding. It is apparent even from the cases cited by the petitioners, however, that the notice procedure prescribed by Rule 71A, and followed by the DCRLA, is consistent with due process requirements. The principal cases on which petitioners rely, *Schroeder* v. *City of New York*, 371 U.S. 208 (1962), and *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956), stand only for the proposition that a condemning authority must attempt to provide personal notification of a condemnation proceeding to owners whose names and addresses are readily ascertainable from land records or tax rolls. In the present case, most of the names and addresses were not known to, or readily ascertainable by, the DCRLA. Furthermore, as has been described above, DCRLA went further than required by this Court's decisions in attempting to ensure that all interested parties received notice of the proceeding.

Indeed, as the petitioners have admitted, the DCRLA did succeed in providing actual notice of the condemnation proceeding to "a number of the Foller/Thornton heirs [the petitioners herein] . . . ."[9] Despite having been given notice by publication—and in many cases actual notice—petitioners made no effort to par-

[9] Brief for Appellants at 32, Thornton v. District of Columbia Redevelopment Land Agency, Nos. 75-2124, 75-2125 (D.C. Cir., June 8, 1976) (per curiam).

ticipate in this proceeding until May 1975, more than three years after the proceeding began and more than two years after the just compensation hearing.

Under those circumstances, petitioners have failed to show any denial of due process or any conflict between the holding of the court below and prior decisions of this Court.

C. There Are No Other Reasons Which Would Justify the Granting of Certiorari in This Case.

The petitioners have not attempted to suggest any other basis for the granting of certiorari in this case. They have not asserted—and could not assert—that the decision of the court of appeals is in conflict with the decision of any other court of appeals on the same matter.[10]

The claims which the petitioners are making here already have been rejected by three courts in four separate decisions. Even a cursory review of the record will show, as the lower courts already have determined, that the petitioners' failure to participate in the just compensation hearing was caused by their own lack of diligence rather than by any lack of notice. The record makes it evident that the petitioners had been properly notified of the condemnation proceeding, but failed to come forward for more than two years after entry of the distribution orders.[11]

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[10] On the contrary, the decision was an uncomplicated application of established legal principles. *See, e.g.*, United States v. 22,680 Acres of Land in Kleberg County, 438 F.2d 75 (5th Cir. 1971).

[11] *See* page 5 *supra*.

Under the circumstances, to grant certiorari in this case would be contrary to sound judicial discretion. The amount involved is approximately $20,265.52.[12] That much, or more, already has been spent, or wasted, by the parties and courts involved in actions instituted by the petitioners. Respondents, therefore, respectfully submit that it would be contrary to sound judicial discretion to devote any more of the precious resources of this Court, or any other court, to the oft-rejected claims of these parties who, as the trial court found, "had ample notice" and "slept on their rights . . . ."[13]

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[12] That amount represents half the valuation of the land, minus the sums which were subtracted for unpaid taxes and assessments before distribution of the awards.

[13] A.4-5.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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